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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,	)	CR 18-00172 BLF
	)	
Plaintiff,	)	UNITED STATES' OPPOSITION TO
	)	DEFENDANT'S MOTION IN LIMINE NO. 3 TO
v.	)	EXCLUDE EVIDENCE OF DEFENDANT'S
	)	SALARY (ECF NO. 91)
MICHAEL KAIL,	)	
	)	Pretrial: January 14, 2021 1:30 p.m.
Defendant.	)	Trial: February 22, 2021
	)	Court: Honorable Beth Labson Freeman
	)	

Michael Kail (hereafter "Defendant"), who is defending against twenty-two counts of wire and mail fraud related to his scheme to defraud his then-employer, Netflix, Inc. ("Netflix"), argues that evidence of his salary at Netflix should be excluded. Appearing to conceding its relevance, Defendant argues that evidence of his salary alone is sufficient to engender prejudice against him by the jury to warrant exclusion of such evidence. The Court should deny Defendant's Motion, or reserve a ruling until other evidence is received at trial.

Defendant wrongly argues that any evidence of his salary is "categorically inadmissible." (ECF

No. 91, p. 3).<sup>1</sup> Defendant cites no honest services fraud cases, but rather cites a bank robbery case and a securities fraud case. In neither did the victim of the fraud pay the defendant's salary. Moreover, in *United States v. Mitchell*, 172 F. 3d 1104 (9th Cir. 1999), and *United States v. Bensimon*, 172 F. 3d 1121 (9th Cir. 1999), it was the admission of evidence of the defendant's lack of funds or bankruptcy to establish motive that caused the Ninth Circuit to reverse. In *United States v. Unruh, et al.*, 855 F. 3d 1363, 1377 (9th Cir. 1987), it was evidence of the defendant's "use of the facade of wealth . . . to induce borrowers" that the Ninth Circuit disapproved. Defendant cites dicta in *Bensimon* to support his claim that evidence of wealth "without more" is unduly prejudicial. *Id.*, 172 F. 3d at 1129. As the evidence is not being used to establish motive or intent under Rule 404(b), the Court should not rely on these cases in excluding the evidence.

Defendant is no pauper, and the government is not seeking to introduce evidence of his salary to show that he was motivated to commit the fraud as a result of poverty. Nor is the government seeking to introduce the evidence to show that his salary gave him a motive to seek bribes and kickbacks. Indeed, Netflix's "Culture Deck," a statement of the company's guiding principles (which includes a picture of Jeffrey Skilling, who was charged with taking bribes and kickbacks), states that employees are paid at the "top of market." The government anticipates that evidence at trial will include Netflix's philosophy of paying employees very well, in part to ensure loyalty and avoid financial conflicts of interest. Indeed, should Defendant's argue that his pay at Netflix left him with little incentive to cheat the company, the government would be unable to rebut him with a comparison of the hundreds of thousands of dollars in cash and shares to his high six-figure salary.

Defendant misconstrues the evidence, arguing that his raises reflect Netflix's happiness with his work. Defendant is not charged with discharging his duties poorly, rather, he is charged with violating his fiduciary duties to his employer, which paid him handsomely for what is believed was his performance of those duties. Only after Mr. Kail left Netflix did it discover that he had lied about his lack of conflicts of interest with companies that Netflix was paying for its IT needs. Evidence of the

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<sup>1</sup> This is also the first time the defense has stated that "it is undisputed that Mr. Kail received consulting fees, earnings, and distributions from exercise options from various companies." *Id.*

1 salary paid by the victim employer is direct evidence inextricably related to the crime charged in this  
 2 case. Although the government would consider a stipulation that would avoid the need to introduce the  
 3 W-2s, the evidence is relevant and not overly prejudicial for the charged white-collar crimes.

4 There is little doubt that Defendant will *voir dire* the prospective jurors about biases toward  
 5 defendant, and his affluence in particular. The jury, being properly instructed (including limiting  
 6 instructions), will accept the evidence only for its proper purpose. Defendant's Motion, in effect,  
 7 demonstrates his lack of faith in a properly instructed jury or in the Court to ensure that such evidence is  
 8 not highlighted by the government to effect prejudice.

9 Finally, evidence of Defendant's salary at Netflix will be curiously absent in light of the  
 10 evidence of his job duties, corporate policies, and voluminous evidence of his receipt of hundreds of  
 11 thousands of dollars and thousands of share options in tech startups. Defendant's W-2s for the years at  
 12 issue will also help the jury distill the financial analysis of the flow of funds into the residence and  
 13 particularly the downpayment, some of which is traceable to the fraud scheme and some of which was  
 14 traceable to Defendant's salary from Netflix.

# 15 I. CONCLUSION

16 Evidence of Defendant's salary at Netflix, the company he allegedly defrauded through a bribe  
 17 and kickback scheme, is relevant and its probative value does not outweigh any prejudicial effect. For  
 18 the foregoing reasons, the Court should deny Defendant's Motion *In Limine* to exclude any evidence of  
 19 the salary paid to him by the victim of the alleged fraud scheme, or in the alternative delay a ruling until  
 20 trial.

22 DATED: January 7, 2021.

Respectfully submitted,

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25 /s/ Colin Sampson

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